

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHEILA M. WIMBERLY,)	
)	No. 63199-3-I
Appellant,)	
)	DIVISION ONE
v.)	
)	
KING COUNTY,)	
)	
Respondent,)	
)	
and)	
)	UNPUBLISHED OPINION
THE DEPARTMENT OF LABOR AND)	
INDUSTRIES, STATE OF)	FILED: April 5, 2010
WASHINGTON,)	
)	
Defendant.)	
)	
)	

BECKER, J. — Sheila Wimberly suffered from carpal tunnel disease and overuse tendonitis because of her job. Approximately nine years after allowing her claim for industrial insurance benefits, the Department of Labor and Industries closed the claim with no award for a permanent disability. Wimberly appealed the closure to the Board of Industrial Insurance Appeals, claiming that her industrial injury caused her depression and that she was permanently or

partially disabled as a result. The Board disagreed, and a jury found that the Board was correct. The trial court did not err in instructing the jury. We affirm.

FACTS

From December 1994 to December 1995, Sheila Wimberly worked as a payroll clerk doing data entry for King County. After approximately seven to eight months on the job, she started to have severe pains in her hands, with a tingling sensation and numbness in her hands and arms. She sought medical treatment from Dr. Lawrence Holland, who diagnosed her with carpal tunnel syndrome and overuse tendonitis. On October 12, 1995, Wimberly filed a claim for industrial insurance benefits with an injury date of September 27, 1995. The Department of Labor and Industries allowed Wimberly's claim on April 16, 1996. Wimberly went through vocational services for years but was never successfully retrained or placed. Due to medical restrictions, numerous jobs were unsuitable for her.

Around the same time, in September 1995, Wimberly was treated by a psychiatrist, Dr. Patricia Barnes, who determined that Wimberly was having a major depressive episode caused by the cumulative effect of several stressors in her life. Barnes identified those stressors as difficulty in the workplace, trying to buy a home, insomnia, and a lack of familial support for the responsibilities of taking care of three young children. In January 1998, Wimberly began to see Dr. Barnes again related to a recurrent severe major depression. Dr. Barnes diagnosed major depression again in 2002.

On June 17, 2005, the Department of Labor and Industries closed the claim with time-loss compensation for temporary total disability ended as paid to September 10, 2004. The Department made no award for permanent disability. Wimberly appealed the decision to the Board of Industrial Insurance Appeals. The issues presented to the Board were whether Wimberly's 1995 occupational injury proximately caused a psychiatric condition, temporary total disability from September 11, 2004 to June 17, 2005, permanent partial disability, and/or permanent total disability as of June 17, 2005.

An industrial appeals judge heard testimony from Wimberly, her husband, Dr. Holland, Dr. Barnes, two vocational rehabilitation counselors, a neurologist, an orthopedic physician, another psychiatrist, and a plastic surgeon. Dr. Barnes offered the opinion that Wimberly's recurrent depressive condition resulted from her inability to find a way around the limitations caused by her industrial injury. On October 30, 2006, the industrial appeals judge issued a proposed decision and order affirming the June 17, 2005 order of the Department of Labor and Industries. The industrial appeals judge found that as of September 1995, Wimberly's hands suffered from bilateral carpal tunnel syndrome and overuse tendonitis because of her job but that the preponderance of the evidence refuted Dr. Barnes' testimony that the carpal tunnel syndrome was the proximate cause of her depression. On January 9, 2007, the Board of Industrial Insurance Appeals issued a decision and order affirming the proposed decision and order.

Wimberly appealed to the King County Superior Court. Her case went to

trial before a jury. The jury heard the same evidence presented to the Board. Wimberly objected to the verdict form and certain instructions.

The jury found that the Board was “correct in its determination that Sheila Wimberly’s September 27, 1995 occupational disease did not proximately cause her to be temporarily totally disabled from September 11, 2004 through June 17, 2005.” And the jury found that the Board was “correct in its determination that as of June 17, 2005, Sheila Wimberly had no permanent disability proximately caused by her September 27, 1995 occupational disease.” Wimberly appeals, assigning error to the verdict form and certain instructions.

JURY VERDICT FORM

Jury verdict forms, like jury instructions, are sufficient when they “allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.” Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.3d 682 (1995). We review alleged errors of law in jury instructions and verdict forms de novo. Hue, 127 Wn.2d at 92. Where jury instructions are sufficient, we review the specific wording and number of instructions for abuse of discretion. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996); Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 151, 210 P.3d 337 (2009).

Wimberly’s theory of the case, as presented in her trial brief in superior court, was that her industrial injury was a proximate cause of her disabling psychiatric condition. She asserted that her temporary total disability continued

from September 11, 2004 through June 17, 2005—nine months longer than benefits had been allowed. She alleged that after June 2005 she was permanently disabled, either partially or totally, because of her industrial injury and causally related psychiatric condition.

The Board's findings against Wimberly were set forth for the jury in unchallenged instruction 7:

This is an appeal from the findings and decision of the Board of Industrial Insurance Appeals. The Board made the following material findings of fact:

1. On October 12, 1995, the claimant, Sheila M. Wimberly, filed an application for benefits alleging that she had sustained an industrial injury or disease in the course of her employment with King County. On June 17, 2005, the Department of Labor & Industries issued an order closing her claim with time loss ended September 10, 2004 and no permanent partial disability award. On June 27, 2005, Ms. Wimberly filed a notice of appeal with the Board of Industrial Insurance Appeals. On July 7, 2005, the Board issued an order granting the notice of appeal, assigning it Docket No. 05 16555, and directing that proceedings be held on the issues raised by the notice of appeal.
2. From December 1994 through December 1995, Sheila M. Wimberly worked as a payroll clerk for King County. Her work involved data entry, with two to three hours of hand writing, and five to six hours of computer keyboarding every day. The repetitive writing and keyboarding constitute distinctive conditions of her employment with King County.
3. As of September 27, 1995, Ms. Wimberly's hands suffered from bilateral carpal tunnel syndrome and overuse tendonitis, which arose naturally and proximately from the distinctive conditions of her employment with King County.

4. Ms. Wimberly did not develop any psychiatric condition which was proximately caused by her occupational exposure or disease. Conditions diagnosed as depression and associated anxiety were neither proximately caused nor aggravated by her occupational exposure or disease.
5. Ms. Wimberly's carpal tunnel syndrome has been neither symptomatic nor disabling. By September 10, 2004, the overuse tendonitis proximately caused by her 1995 occupational exposure had resolved, and her continuing complaints were unrelated to her occupational exposure.
6. Between September 11, 2004 and June 17, 2005, Ms. Wimberly was not precluded by the effects of her occupational disease from engaging in gainful employment on a reasonably continuous basis.
7. As of June 17, 2005, Ms. Wimberly's occupational disease was at maximum medical improvement, and resulted in no permanent impairment.
8. As of June 17, 2005, Ms. Wimberly was capable of gainful employment on a reasonably continuous basis, taking into consideration her occupational disease, as well as her age, education, training and work experience.

By informing you of these findings the court does not intend to express any opinion on the correctness or incorrectness of the Board's findings.

The jury was informed of Wimberly's claims regarding the Board's findings in unchallenged instruction 9:

Sheila Wimberly claims that the findings and decision of the Board are incorrect in that:

1. Ms. Wimberly's psychiatric conditions depression and anxiety were proximately caused, aggravated and/or lit up by her occupational exposure or disease(s).
2. Between September 11, 2004 and June 17, 2005, the

effects of Ms. Wimberly's occupational disease(s) proximately caused her to be precluded from engaging in gainful employment on a reasonably continuing basis.

3. As of June 17, 2005, Ms. Wimberly was totally and permanently disabled due to her occupational disease(s), age, training, and work experience, which proximately caused her to be unable to perform or obtain reasonably continuous gainful employment. Or in the alternative, Ms. Wimberly's occupational disease(s) proximately caused a permanent impairment of 10 percent of total bodily impairment for each upper extremity and a Category II mental health impairment.

The Court gave the following verdict form over Wimberly's objection, and by answering "yes" to the first two questions, as indicated below, the jury rendered a defense verdict:

We, the jury, make the following answers to the questions submitted by the court:

Question No. 1.

Was the Board correct in its determination that Sheila Wimberly's September 27, 1995 occupational disease did not proximately cause her to be temporarily totally disabled from September 11, 2004 through June 17, 2005?

Answer: Yes (Yes or No)

Question No. 2.

Was the Board correct in its determination that as of June 17, 2005, Sheila Wimberly had no permanent disability proximately caused by her September 27, 1995 occupational disease?

Answer: Yes (Yes or No)

If your answer to Question 2 is "Yes," do not answer any further questions. If your answer is "No," proceed to Question 3.

Question No. 3.

Did Sheila Wimberly's occupational disease of September 27, 1995 proximately cause her to be permanently totally disabled as of June 17, 2005?

Answer: ____ (Yes or No)

If your answer to Question 3 is "Yes," do not answer any further questions. If your answer to Question 3 is "No," proceed to Questions 4 and 5.

Question No. 4.

What category of permanent mental health impairments most accurately describes Sheila Wimberly's level of permanent mental health impairment as of June 17, 2005, proximately caused by her September 27, 1995 occupational disease?

Answer: (Check only one category)

___ Category 1 of permanent mental health impairments

___ Category 2 of permanent mental health impairments

Question No. 5.

What was the extent of Sheila Wimberly's permanent partial physical disability as of June 17, 2005, proximately caused by her occupational disease of September 27, 2005?

Answer:

___ % of the amputation value of the RIGHT arm at the shoulder (choose a percentage 0 to 10%)

___ % of the amputation value of the LEFT arm at the shoulder (choose a percentage 0 to 10%)

Wimberly proposed that the court instead use a verdict form that would directly elicit a finding on whether or not her occupational disease of September 1995 caused her depression. Her Question No. 2 asked:

Whether Sheila Wimberly's depression and associated

anxiety were proximately caused by her occupational disease of September 27, 1995?

ANSWER: __ (Yes or No)

Wimberly contends that the trial court excluded issues of fact relating to her psychiatric condition from the jury by not using the jury verdict form she proposed.

The verdict form as submitted to the jury did not prevent Wimberly from presenting her theory to the jury. If the jury concluded that Wimberly had any condition—either physical or psychiatric or both—that caused her to be totally temporarily disabled from September 11, 2004, through June 17, 2005, the jury would have indicated in response to question 1 that the Board was not correct. And if the jury decided that Wimberly had a permanent disability, either total or partial, whether caused by physical or psychiatric conditions or both, they would have so indicated in response to questions 2 and 3. Finally, unchallenged instruction 9 made it clear to the jury that Wimberly was claiming that the Board incorrectly decided that her industrial injury was not a cause of her depression. The trial court's verdict form did not exclude issues of fact relating to her psychiatric condition from the jury.

The trial court must “advise the jury of the exact findings of the board on each material issue before the court.” RCW 51.52.115. Wimberly contends that under this statute, the court should have used question 2 of her proposed verdict form so that she could ask the jury to contradict the Board's finding of fact 4 and

find that she did develop a psychiatric condition that was proximately caused by her occupational disease. But the trial court met the statutory requirement by giving instruction 7, which stated the exact findings of the board. We conclude the verdict form used by the trial court was satisfactory.

INSTRUCTION ON "LIGHTING UP"

Wimberly argues that the trial court erroneously instructed the jury on the lighting up doctrine as set forth in Miller v. Dep't of Labor & Indus., 200 Wash. 674, 682-83, 94 P.2d 764 (1939):

It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any preexisting or congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated.

Miller, 200 Wash. at 682-83, cited in Wendt v. Dep't of Labor & Indus., 18 Wn. App. 674, 676, 571 P.2d 229 (1977).

The trial court found that the evidence, presumably the testimony about Wimberly's depression that preexisted her injury date of September 27, 1995, supported a lighting up instruction. The instruction given, however, did not use the phrase "lighting up":

The Industrial Insurance Act provides for benefits when a disability has been proximately caused by an industrial injury. This does not involve any consideration of "fault" or "negligence" by either the employer or the worker.

The term "proximate cause" means a cause which in a direct sequence produces the disability complained of and without which

such disability would not have happened.

There may be more than one proximate cause of a disability. For a worker to recover benefits under the Act, the industrial injury must be a proximate cause of the alleged disability but it is not required that the industrial injury was the sole proximate cause of such disability. If the industrial injury was a proximate cause of the disability, the claimant is entitled to recovery for the full disability regardless of any preexisting condition.

Wimberly asserts that the trial court should have instructed the jury as follows:

If an industrial injury lights up or makes active a latent and quiescent infirmity or condition, then the resulting disability is to be attributed to the injury and not to the pre-existing condition. Under such circumstances the worker may recover for the full disability proximately caused by the industrial injury regardless of any pre-existing condition.

We find no error. Instruction 11 correctly states the fundamental principle of the lighting up doctrine according to Miller and Wendt by explaining that a claimant is entitled to recovery for the full disability regardless of any preexisting condition if the industrial injury was a proximate cause of the disability. The trial court did not want to use the terms “light up,” “latent,” or “quiescent” because none of the witnesses used those terms in their testimony and the court believed they would seem strange to the jury. The terms are not inherently confusing, but they are somewhat archaic. We conclude the trial court did not abuse its discretion by rephrasing the lighting up instruction in a way that would make sense to the jury.

INSTRUCTION ON MEDICAL TESTIMONY AND CAUSATION

Wimberly contends the court erred by failing to give a proposed instruction on how to evaluate medical testimony about causation.

King County presented medical testimony suggesting that to the extent Wimberly suffered from depression, it was caused by conditions unrelated to her occupation. Dr. Michael Friedman, a psychiatrist, gave his opinion in these

terms: “I do not feel that she has a psychiatric condition related to her employment or her condition while working with the County.” And, “I didn’t feel that there was a psychiatric condition related to the injury proper.” On cross-examination, he admitted that he did not know what Wimberly’s mental health condition was in 2005.

Q. You can only speculate, is that right?

A. That’s right.

Q. How about 2004?

A. You are right. I can only speculate.

Q. 2003?

A. I have no idea. Haven’t seen her since 1998.

Wimberly contends that Dr. Friedman’s testimony “does not measure up to the probability standard that the law requires.” Wimberly’s proposed instruction stated that medical testimony about causation is not sufficient when phrased in terms of possibility:

Medical testimony is necessary to establish the proximate cause relationship between the occupational disease and/or the mental health condition for which compensation is sought and the need for medical treatment or the extent of disability proximately caused by an occupational disease.

Medical testimony as to the possibility of a causal relationship is not sufficient to establish such relationship. Testimony as to possibility means testimony which is confined to words of speculation, surmise and conjecture. It is not sufficient to establish that the occupational disease might cause, could cause, can cause, or probably could cause such condition.

The instructions, when read as whole, correctly informed the jury about

the burden of proof and the role of medical testimony. Instruction 8 stated that the burden of proof was on Wimberly to establish that the Board's decision was

incorrect by a preponderance of the evidence. Instruction 8 explained that the preponderance of the evidence standard meant the jury had to be convinced that a proposition was more probably true than not. Instruction 11 informed the jury that the industrial injury must be a proximate cause of the disability. Instruction 15 explained that any “determination on the extent of Sheila Wimberly’s disability must be supported by medical testimony.”

Wimberly argues that by not giving her proposed instruction, the trial court prevented her from challenging the sufficiency of King County’s medical testimony. But King County did not have the burden of proof; therefore, the medical testimony offered by King County did not have to meet a standard of sufficiency. Within the instructions given, Wimberly was able to argue that her industrial injury caused her depression and that the medical testimony offered by King County was too conjectural to rebut this evidence. For example, instruction 4 explained that the jury is not required to accept the opinion of an expert and may determine the weight given those opinions. There is no abuse of discretion when a trial court declines to give an unnecessary instruction. Wimberly’s proposed instruction would not have added any legally applicable standards relating to medical testimony and causation.

In conclusion, we find no error in the verdict form or the instructions. We do not address Wimberly’s assignment of error alleging “ad hominem” attacks as she has not provided argument or citation to legal authority concerning it. See RAP 10.3(a)(6); Puget Sound Bank v. Richardson, 54 Wn. App. 295, 298, 773

P.2d 429 (1989). Her request for attorney fees under RCW 51.52.130 is denied.

Affirmed.

Becker, J.

WE CONCUR:

Jan, J.

Cox, J.